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No. 89-624

In The

Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,

Petitioners,

v.

PRIMARY STEEL, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR AMICI CURIAE MCLEAN TRUCKING COMPANY, CHARLES COVEY, TRUSTEE FOR UNZICKER TRUCKING, INC. AND BRUCE HUSSEY, TRUSTEE FOR COLUMBIA NAVIGATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

McLean Trucking Company is a motor common carrier of property pursuant to operating authorities issued to it by the Interstate Commerce Commission. McLean Trucking Company is a debtor-in-possession under Chapter 11 of the United States Bankruptcy Code.

Charles Covey is the Trustee of Unzicker Trucking, Inc., a debtor under Chapter 7 of the United States Bankruptcy Code. Bruce Hussey is the Trustee of Columbia Navigation, Inc., a debtor under Chapter 7 of the United States Bankruptcy Code. Unzicker Trucking, Inc. and Columbia Navigation, Inc. were motor common carriers licensed by the Interstate Commerce Commission.

The above-named Amici each are liquidating assets of their respective bankruptcy estates. These assets include claims for freight charges similar to that asserted by the Petitioners herein against the Respondent. This brief is submitted in support of the Petitioners.

SUMMARY OF ARGUMENT

The sole issue herein is whether in an action to recover tariff charges pursuant to 49 U.S.C. sec. 11706(a), an unpublished rate agreement of the parties may be asserted as a defense. This issue is important because the effect of an affirmance of the court of appeals decision would be to allow shippers and carriers to completely ignore the filed tariff charges and the requirements of the Interstate Commerce Act, specifically 49 U.S.C. secs. 10761(a), 11901, 11902 and 11903.

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. This admittedly harsh rule of law is unwavering in its application because the Act's underlying purposes would be completely undermined by creating exceptions on a case-by-case basis

favoring the interests of individual shippers and their secret rate deals. The court below incorrectly found that a court must recognize equitable defenses where the ICC has given its blessing to secret rate agreements of the parties. Primary Steel, Inc. contends that this is a matter within the ICC's primary jurisdiction and that the trial court properly affirmed the Commission's decision.

The court below found that the ICC may employ a general policy provision of the Interstate Commerce Act to nullify the mandatory requirements of a specific provision. It found that the ICC's jurisdiction over carrier practices set forth in section 10701(a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section 10701(a) is a general policy section which grants the Commission no remedial power at all. Moreover, the practice found unreasonable by the Commission is the collection of lawful tariff charges. This is not a carrier practice, but a statutorily mandated requirement. 49 U.S.C. sec. 10761(a). This strict rule of law finds its genesis in the statute itself and Supreme Court construction thereof and the courts had no valid basis on which to alter it.

The efforts to cast the shadow of the ICC's jurisdiction over the district court's decision are misplaced. The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction carrier over "practices". The question is whether a voluntary, mistaken, or intentional deviation from the tariff rate nullifies the requirements of 49 U.S.C. sec. 10761(a) so as to defeat a motor common carrier's right to collect its tariff charges. Neither the ICC or any district court, acting individually or in concert

with one another, have the authority to waive the requirements of section 10761(a) on the basis of agreements between the parties which result in departure from lawful tariff rates.

ARGUMENT

THE OPINION BELOW IS INCONSISTENT WITH THE INTENT OF CONGRESS AS EXPRESSED IN THE INTERSTATE COMMERCE ACT

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule of law is strictly applied because otherwise the Act's underlying purposes could be circumvented through judicially or administratively created exceptions favoring the interests of individual shippers and their secret rate deals. As this court held on the eve of the new Act to Regulate Commerce of 1887:

> It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to seek equality of rates as to all and to destroy favoritism, the last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

New Haven R. R. v. I.C.C., 200 U. S. 361, 391 (1906). Despite this long established precedent, the Court of Appeals below held that illegal, unpublished rates can be

given legal effect as long as the ICC determines the collection of the filed rate to be an "unreasonable practice". The Court of Appeals improperly found that the ICC's jurisdiction over carrier practices set forth in section 10701(a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section 10701(a) is only a general policy section that grants the Commission no remedial power at all. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). Moreover and fundamentally, the practice found to be unreasonable by the Commission is the collection of lawful tariff charges. This alleged "carrier practice" is actually a statutorily mandated requirement. See 49 U.S.C. sec. 10761(a). This strict rule of law derives from the statute itself and Supreme Court construction thereof, and neither the Commission nor the courts have authority to alter it.

The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction over carrier "practices". The question is whether a voluntary, mistaken, or intentional deviation from a tariff rate nullifies the requirements of 49 U.S.C. sec. 10761(a) so as to defeat a motor common carrier's right and duty to collect its lawful tariff charges. Neither the ICC nor the courts, acting either individually or in concert with one another, have the authority to waive the requirements of section 10761(a) on the basis of secret agreements that result in departure from lawful tariff rates.

The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate is allowable when the ICC declared the collection of the applicable and lawful filed rate to be an unreasonable

practice. 881 F.2d 546, 548. This contention is based on the erroneous assertion that, absent a determination by a U.S. District Court that the ICC's opinion is not supported by substantial evidence, an advisory opinion by the ICC ignoring the tariff collection requirements of the Act is binding upon the reviewing court. Thus, the question presented is the correctness of the Court of Appeal's resolution of a legal issue, namely, whether or not the ICC may allow assertion of an equitable defense under the guise of an "unreasonable practice" in an action at law to collect tariff charges.

The Court of Appeals improperly held that courts must grant equitable defenses where the ICC concludes that in particular circumstances the filed rate doctrine is unfair.[1] However, the Act provides that the courts have exclusive jurisdiction over actions to recover motor carrier tariff charges. 49 U.S.C. sec. 11706(a). As discussed above, courts cannot allow equitable defenses by giving legal effect to rate agreements prohibited by statute. By the same token, the ICC has no authority to order the waiver of motor carrier undercharges, as the Commission itself concedes.[2] Nor does it have the authority to waive the tariff filing and adherence requirements of section 10761(a). *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). Notwithstanding these statutory prohibitions, the Court of Appeals found that the ICC may, upon referral from a court, circumvent

[1] Unless the reviewing court holds that the ICC's findings are arbitrary, capricious or not supported by substantial evidence. 881 F.2d 546, 550.

[2] The Court of Appeals on the other hand, erroneously suggests that the ICC has such power. 881 F.2d 546, 550.

the filed rate doctrine. However, a court and an agency cannot act in concert through the referral process to accomplish indirectly that which neither can do directly. Cf. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246, 254 (1951). The Commission's opinion did not address an issue entrusted to its expertise, but merely decided a question that has already been determined by this Court for decades. Nevertheless, the Court of Appeals contends that the ICC, through its self-proclaimed jurisdiction over carrier practices under 49 U.S.C. sec. 10701(a), can determine that the requirements of section 10761(a) are unreasonable and should be waived. In effect, the court found that the Act may be used to defeat itself. This is not the law. The "practice" condemned by the Commission is the statutory requirement of adherence to lawful tariff charges. If Congress desired to give the Commission authority to relieve motor common carriers from the requirements of section 10761(a), it could have done so, just as it did with respect to motor contract carriers. See 49 U.S.C. sec. 10761(b) (authorizing the Commission to relieve contract carriers from the requirements of section 10761(a)). In light of the comprehensive review of this area of the law by Congress in 1980, it cannot be seriously argued that the Commission has been granted power by section 10701(a) to relieve common carriers of the requirement to strictly adhere to filed tariffs.

Part II of the Act, originally enacted as the Motor Carrier Act of 1935, did not empower the Commission or the courts to determine reasonableness of rates on past shipments or afford shippers a cause of action or defense for past violations of the Act by a carrier. *T.I.M.E., Inc.*,

supra, at 469.[3] Ultimately, a compromise was struck in the 89th Congress which created for the first time a justiciable legal right to reparations against motor carriers based upon their duty to establish and maintain just, reasonable and non-discriminatory rates; however, it denied the Commission power to compel reparations and instead vested such power in the courts. *Compare* 49 U.S.C. sec. 10704(b)(1) *with* sec. 10704(b)(2).

The sole remedy of a shipper with respect to *rates* on past shipments is to commence a civil action against a carrier for reparations. Thus the Act affords shippers a remedy for "damages resulting from the imposition of rates for transportation or service the Commission . . . finds in violation of the Act". 49 U.S.C. sec. 11705(b)(3). Therefore the involvement of the Commission is purely ancillary to an action at law for reparations, namely to determine whether the filed tariff rates were unjust, unreasonable, discriminatory, prejudicial or preferential. Even after the Commission makes such determination, it is the exclusive prerogative of the court whether or not to follow the Commission's findings. Thus the Act, after revision in light of *T.I.M.E., Inc.*, makes clear that the shippers and carriers must look only to the filed tariff to determine the rights of the parties unless the tariff or rates contained therein are found to be unreasonable. In the matter at bar, there was no finding by the ICC that Petitioners' rates were either discriminatory or unreasonable.

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[3] "Language of this sort in a statute . . . creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right' ".

The proposition that the Act permits either the Commission or a court, or both, to ratify illegal rate agreements turns the statute on its head. If true, then the ICC would have the power, through the courts, to use section 10701(a) to nullify the requirements, prohibitions, and civil and criminal sanctions provided by sections 10761(a), 11901, 11902, 11903, 11904 of the Act. Explaining the statutory scheme with respect to the filed rate doctrine, this Court has warned that "the act cannot be held to destroy itself." *Texas & P.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 358 (1907).

Sections 10761(a) and 10701(a) of the Act are not mutually exclusive. Rather, they constitute the regulatory scheme Congress believed necessary to ensure that all shippers utilizing motor common carriers pay the full tariff charge. The ICC's "remedy", on the other hand, undermines the statutory scheme by condoning special rate agreements permitting individual shippers – such as Primary Steel, Inc. – to retain the benefit of a secret rate agreement. Validation of such agreements results in discrimination against those shippers who abide by the law by paying the filed tariff rate.

The rigid requirements of the filed rate doctrine reflect the will of Congress and only that body may change the statutory mandate. *Thurston Motor Lines v. Jordan K. Rand*, 460 U.S. 533 (1983). The exceptions Congress has permitted are narrow and carefully delineated. For example, the reparations remedy provided in 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2) permits challenges to the lawfulness of tariff rates on past shipments. Even then, the shipper must first pay the tariff rate before it can be challenged as unreasonable.

In no case cited by the Court of Appeals in the opinion below was an unlawful rate agreement of the parties allowed to supplant a lawful tariff rate. The Supreme Court and circuit cases cited by the court of appeals below simply stand for the proposition that the Commission can find a tariff provision unreasonable. No such finding was made in the proceeding below. Instead, the court found that an otherwise lawful tariff rate may not be collected. Moreover, in each case cited, the ultimate result was payment by the shipper of a published tariff rate, albeit a different one than that advanced by the carrier. In none of the cases cited by the court below was an unpublished, negotiated rate allowed to apply in lieu of a filed rate. Furthermore, the Court of Appeals made no attempt to reconcile the decision below with Supreme Court decisions affirming the rule of strict adherence to filed tariffs. If the Court of Appeals decision is permitted to stand, Primary Steel, Inc. will have entirely circumvented the application of legal tariff rates.

The court below ignored over eighty years of Supreme Court precedent on this question of law. This Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* [Emphasis supplied].

In *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has invariably applied this rule of law when it has addressed the issue of adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines v. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (carrier has absolute right to collect tariff charges on every shipment); *Southern Pacific Transportation v. Commercial Metals Co.*, 456 U.S. 336 (1982) (equitable defense of carrier's violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918) (where the Court stated that a carrier's claim is, of necessity, predicated on the tariff-not an understanding with the shipper).

In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), this Court reaffirmed the continuing validity of the filed rate doctrine and its attendant prohibition against any departures from the tariff rate citing, citing among other cases, *Maxwell*. 476 U.S. at 416-417. Although *Square D* involved an antitrust challenge to filed rates, attempts to distinguish it fail in view of this

Court's specific language stating that the filed tariff defines the rights of the shipper and carrier and cannot be varied by tort or contract. 476 U.S. 416-417.

The ICC's policy upon which the Court of Appeals relied admittedly results not from any change in the statute but rather from a less regulated atmosphere created by the Motor Carrier Act of 1980. This, however, is inconsequential for the purpose of inferring any change in the intent of Congress.[4] As this Court stated in *Square D, supra,* Congress in 1980 carefully re-examined what has been settled law for nearly three quarters of a century and did not see fit to change it. Neither the Court of Appeals nor the ICC in its policy statement have pointed to any statutory provision or legislative history indicating a specific congressional intent to overturn the filed rate doctrine. Indeed, they are unable to do so for good reason. To be sure, the legislative history indicates that when Congress was overhauling the Interstate Commerce Act in 1980, ICC discretion was eliminated. H.R. No. 1069, 96th Cong. 2d Sess. reprinted at U.S. Cong. and Admin. News Service, 96th Cong. at 2292. Senator Cannon, one of the sponsors of the Motor Carrier Act of 1980 stated:

> This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated. 126 Cong. Rec. 7777 (1980).

[4] Indeed, when Congress carefully re-examined this area in 1980, it did so in light of Section 10761(a) and substantial precedent interpreting that section of the statute. At that time Congress left intact the filed rate requirement for common carriers.

Thus, it is clear from both the statute and the legislative history that had Congress intended to change the requirement of strict adherence to tariffs it would have done so. As the *Square D* Court noted, "harmony with the general legislative purpose is inadequate for that formidable task." 476 U.S. 420.

CONCLUSION

The Court of Appeals erred in relying on an ICC advisory decision which is contrary to law. The decision below and the ICC opinion on which it relies subverts a Congressionally fashioned regulatory scheme by allowing motor common carriers and their customers to freely negotiate prices without complying with the requirements of section 10761(a). Congress has neither eliminated nor altered the strict tariff adherence requirements of the Act for motor common carriers and until it does, equitable defenses are statutorily barred in actions at law such as the present proceedings.

Accordingly, the Court of Appeals opinion below should be reversed.

Respectfully submitted,

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